

1 IN THE CIRCUIT COURT OF THE STATE OF OREGON
2 FOR THE COUNTY OF MULTNOMAH
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4

5 THE ESTATE OF MICHELLE)
6 SCHWARZ, deceased, by and)
7 through her Personal)
8 Representative, RICHARD)
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Defendant's Closing Statement

By Mr. Dumas.....4

4

MORNING SESSION

Friday, March 15, 2002

11:00 a.m.

(Jennifer Wiles reported the initial session)

(Court was reconvened at 11:00 a.m.)

THE COURT: Bring the jury, please.

(Jury entered the courtroom at 11:00 a.m.)

THE COURT: All right.

Counsel for the defense, you may proceed with your closing.

MR. DUMAS: Thank you very much, Your Honor.

May it please the Court, counsel, ladies and gentlemen of the jury.

Mr. Wobbrock is right, certainly about one thing, and that is your job: The most difficult part of your job is about to begin.

My comments for the next approximately hour and a half, I hope, will be for the most part limited to Michelle Schwarz because, fundamentally, this case, I believe, is mostly about Michelle Schwarz.

Mr. Phillips, when I'm done, will be talking to you mostly about Philip Morris because in a case like

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this, both parties -- both parties, Michelle Schwarz and Philip Morris -- were aware of certain things, made certain choices, made certain decisions, and have certain responsibilities that come with those choices and those decisions.

But this case is also, of course, about cigarettes. Cigarettes are a very unique product. Cigarettes are unlike any other consumer product in the world. And I think that fundamental fact illuminates

10 the distinction between Mr. Wobbrock's view of this
11 case and mine.

12 You know, folks, when I go down to Les Schwab and
13 buy a Firestone Tire and put that on my vehicle, my
14 expectation, my understanding, my belief of how that
15 product will perform is that it's not going to blow out
16 when I go 70 miles an hour.

17 When I go down to Landmark Ford and buy a Ford
18 Explorer and drive up to Mount Hood, my expectation, my
19 belief as a reasonable consumer with experience about
20 cars is that when I make a sudden turn, that SUV is not
21 going to roll over. Where did I learn that? I learned
22 it from life experiences.

23 Contrast that, ladies and gentlemen of the jury,
24 with the cigarette. What is a reasonable person's
25 expectations and understanding about what a cigarette

6

1 can do to you? Whether it's a full flavor cigarette, a
2 medium flavor cigarette, a light cigarette, an ultra
3 low-tar cigarette, our understanding, our expectation,
4 our knowledge and our awareness of the inherent
5 characteristics of that product is that if we use it,
6 it can kill us.

7 Cigarettes are inherently dangerous, cigarettes
8 are unavoidably dangerous. Why? Because burning
9 tobacco, the smoke from burning tobacco, contains over
10 4,000 compounds, many of which are toxic and can cause
11 cancer and other diseases. What makes a cigarette
12 dangerous is not the humectants, what makes a cigarette
13 dangerous is not the sugars, what makes a cigarette
14 dangerous is not the additives, the one or 2 percent.
15 What makes cigarettes dangerous is inhaling burning
16 tobacco smoke, the smoke created from burning tobacco.
17 And those cigarettes, when used as intended, can cause
18 cancer and can shorten your life. And everybody knows
19 that.

20 I commented upon that in opening statement.
21 Everyone who came in this courtroom, before they heard
22 anything from Mr. Wobbrock, before they heard anything
23 from me, from any of the witnesses, knew that it's got
24 a warning label right on it. It's got a warning label
25 on it because our society has made a tough call, a

7

1 tough decision -- a right decision, a wrong decision, I
2 don't know -- but a decision that cigarettes are legal
3 and can be sold in this country with an appropriate
4 warning written by Congress.

5 Mr. Wobbrock -- very, very skillful lawyer --
6 spent many hours criticizing Philip Morris' conduct.
7 Why didn't Philip Morris do more to make a safe
8 cigarette? They could have done this, they could have
9 done that. Why didn't they do this?

10 Ladies and gentlemen, we also heard from
11 Mr. Wobbrock that the cigarette business is very
12 profitable. We heard billions of dollars, again and
13 again and again. That the cigarette business is so
14 profitable -- and, indeed, it is. But why is it that
15 there is no safe cigarette anywhere in the world?
16 There are hundreds of tobacco companies owned by
17 countries -- some of them are owned by countries,
18 Japan, other countries -- with all sorts of bright,
19 intelligent people, scientists. Think of a market that
20 might exist for a 100 percent safe cigarette. But no

21 one has been able to do it. And you know why? Because
22 tobacco, when it burns, creates smoke that is
23 dangerous. Period. The end. It's that fundamentally
24 simple. You can't make it. Not yet, any way.

25 Mr. Wobbrock correctly pointed out that when you

8

1 folks go into the jury room with all the evidence, with
2 all the exhibits, with the guidance of His Honor's
3 instructions, you will be applying to that evidence, to
4 those instructions, your life experiences. You will be
5 applying to that evidence and to the law your common
6 sense to reach a verdict, to reach a correct and a just
7 verdict.

8 And let's talk a little bit about life experience.
9 Our life experiences are that the risks of cigarette
10 smoking are well-known and have been well-known for a
11 long, long time. Our life experiences teach us that
12 when people make a decision to smoke, they are making a
13 voluntary decision. They are making a decision for
14 themselves, for their own reasons. It may not be your
15 reason, it may not be your neighbor's reason, it may
16 not be your mother's reason, but it's your reason. And
17 when you make a decision, our life experiences teach us
18 that you're responsible for that decision.

19 When people smoke, they know it's bad for their
20 health. Our life experiences teach us that. We are
21 bombarded day in and day out from every source and
22 direction imaginable with advertising. We filter those
23 ads, we listen to the ads we want to listen to, and we
24 ignore the ones that don't have any meaning to us.

25 We know from our life experiences that advertising

9

1 does not create our desire to do something. Ads don't
2 control us or manipulate our decision making. Our life
3 experiences teach us that we buy what we want to buy,
4 and we leave on the shelf what we don't want to buy.

5 Our life experiences teach us that young people --
6 young people can be over 18 and young people can be
7 under 18 -- but young people do try -- many young
8 people -- do try smoking cigarettes. Our experiences
9 teach us that that normally comes about because of
10 their friends, because of social situations, peer
11 pressure. Peers. That's what our common experiences
12 tell us.

13 Our common sense tells us that, then, that when we
14 make a decision to smoke, it's an individual decision
15 that we make. It's not the tobacco company's decision.
16 Those cigarette packs are sitting there on the store
17 shelf, whether it be Albertson's, whether it be
18 Safeway, whether it be Ross IGA down in Salem or Fred
19 Meyer. They're sitting there, and the customer makes
20 the decision whether he or she wants to buy them.

21 All of us, most of us, have known people who have
22 gotten sick from smoking cigarettes, whether they be
23 family, friends, acquaintances. We all know from our
24 life experiences that those people knew what they were
25 doing when they smoked cigarettes. They knew smoking

10

1 wasn't good for them. They knew that it was up to them
2 as individuals to make the decision of whether or not
3 to smoke.

4 We know from our life experiences that a lot of
5 young people try and experiment with things when they

6 move out of the family home, when they move out and
7 they go away, and they're no longer under their
8 parent's thumb. And they do things that they have been
9 taught not to do. We know that as individuals growing
10 up in this society. And we know that sometimes people
11 smoke because a girlfriend smokes or their boyfriend
12 smokes, and so they smoke. Social situations.

13 And we know from our life experiences that people
14 do have the ability to quit smoking when they want to
15 quit smoking. And we know from our life experiences
16 that quitting smoking -- quitting drinking, whatever --
17 is not going to happen until that person reaches the
18 point in their life when they're ready to do it, not
19 when their wife is ready to do it, not when their
20 husband is ready to do it, not when their mother is
21 ready to do it, but when they are, individually, within
22 themselves, because that's where it comes from.

23 We know a little bit about blame from growing up
24 in this society. We know that people can assign blame.
25 But we know in the context of a smoker who gets sick

11

1 from smoking a cigarette, and smoking cigarettes for
2 years, that that blame really ought to come from that
3 person themselves because they're the ones who know
4 what they were doing, they're the ones who know why
5 they made their choices. They're the ones who know why
6 they chose to smoke and why they chose not to quit.
7 Blame, I would submit, does not belong in someone
8 else's hands. It belongs in the person who knows why
9 they did what they did.

10 And we know that we, all of us, have grown up in a
11 society where there are rules. And we know that those
12 rules are in place so that all of us can make decisions
13 with an expectation and an understanding whether or not
14 those decisions fit within or without the rules. And
15 we know that it wouldn't be fair and it wouldn't be
16 right and it wouldn't be just to change the rules
17 midstream and criticize someone for what they did 30
18 years ago when the rules were a little different.

19 During opening statement, I told you that all
20 cigarettes can cause cancer. I told you that all
21 cigarettes are addictive. I told you that all
22 cigarettes are dangerous. And not one witness who came
23 into this courtroom on behalf of Philip Morris said
24 otherwise.

25 I mentioned in opening statement that this case is

12

1 about knowledge or awareness of the risks of smoking.
2 This case is about freedom of choice to smoke or not to
3 smoke. This case is about responsibility. And I want
4 to talk about those three things to you to suggest how
5 you might sift through the voluminous amounts --
6 voluminous amount of evidence in this case. But I
7 don't want to talk about those things in the abstract.
8 I don't want to preach. I want to talk about those
9 things in relationship to Michelle Schwarz.

10 Now, in using the ray gun that Mr. Wobbrock finds
11 offensive, and the green he finds offensive, this is
12 something I showed you during opening statement:
13 Knowledge, freedom, responsibility.

14 So this case is about Michelle Schwarz's choice to
15 begin smoking, about her choice to smoke Merit
16 cigarettes, about her choice not to quit until 1997;

17 and, ultimately, it's about responsibility for those
18 decisions and those choices.
19 Now, we've heard the evidence. So what is the
20 evidence about Michelle Schwarz? I believe the
21 evidence in this case has demonstrated that Michelle
22 Schwarz chose to start smoking with knowledge and
23 awareness that cigarettes could be dangerous to her and
24 could shorten her life. I think the evidence has shown
25 that she chose to switch to Merit cigarettes, and we're

13

1 going to talk about the evidence as to why she made
2 that decision.

3 She chose not to quit before 1997. Yes, there
4 were some attempts, and we're going to talk about
5 those. And I do believe -- and I guess this is where
6 Mr. Wobbrock and I differ -- that Michelle Schwarz, as
7 an intelligent, independent-thinking woman in this
8 society, is responsible for her choices and decisions.

9 Now, Mr. Wobbrock doesn't like the word "choice"
10 or "choose." He told you: Watch out. The defense
11 lawyer is going to talk a whole bunch about "choice"
12 and "choose". Be careful.

13 He doesn't like that word because it undermines
14 his case. He knows that Michelle Schwarz made choices.
15 And he tells us: Oh, come on. That wasn't a free
16 choice that she made during 33 years of smoking. None
17 of those were free choices because she was addicted.

18 Now, we're going to talk a lot about addiction
19 later on. But consider this, consider this: If
20 cigarette smoking was so addictive, if cigarette
21 smoking robs each and every smoker of their free will,
22 of their ability to understand what they're doing, if
23 it deprives them of their ability to act freely, then
24 how is it, why is it, how could it possibly be that
25 over 50 million Americans, living Americans, have quit

14

1 smoking permanently. How is it? If cigarette smoking
2 was that addictive, there wouldn't be any ex-smokers.
3 Yet 50 million Americans have been able to beat the
4 addiction of smoking.

5 And if being addicted means you are no longer
6 responsible for your conduct or responsible for your
7 choices or responsible for your decisions, why do we
8 prosecute drug addicts, heroin users, who rob people?
9 Why don't we just say: Oh, gosh, you robbed Mrs. Jones
10 on the street there. But you're a heroin addict or
11 meth addict or cocaine addict, and you're not
12 responsible.

13 Now, Michelle Schwarz was not a heroin addict and
14 she didn't rob anyone, but I want to make a point:
15 People are responsible for their own actions, whether
16 they smoke cigarettes, use alcohol or whatever.

17 We've heard an awful lot about youth smoking in
18 this case, and I'm going to talk about that. I'm going
19 to talk about it up front because God knows it's a hot
20 button issue -- and it should be -- to every person in
21 this courtroom. It should be a hot button issue. It
22 should be the kind of issue that could turn any case,
23 regardless of the facts, 180-degrees because all of us
24 have a responsibility to our children, our own
25 children, and all the children in this society.

15

1 But, you know, ladies and gentlemen, a fundamental

2 fact that Mr. Wobbrock has not talked to you about is
3 that Michelle Schwarz was not a child when she started
4 smoking. Michelle Schwarz -- Michelle Chuck -- was an
5 18 year old young woman who had moved away from home,
6 going to nursing school when she chose to smoke. She's
7 not a kid.

8 Now, for those of us who have 18 year old
9 daughters, that's sometimes hard to swallow. But the
10 fact remains, our society allows 18 year olds to make a
11 lot of decisions, a lot of very profound decisions that
12 can affect them for the rest of their lives. Eighteen
13 year olds can move out of the family home, they can go
14 become starving actors and actresses in New York City,
15 and we can't stop them. Eighteen year olds can go
16 marry some guy that rides a Harley motorcycle, and we
17 can't stop them. Eighteen year olds can sign
18 contracts, 18 year olds can serve in the military, they
19 can die in Afghanistan, they can have children, they
20 can do all these things. Just about the only thing I
21 can't think of in this society is buy and drink
22 alcohol.

23 And it may be that society's rule with regard to
24 18 year olds and tobacco should be changed. Maybe we
25 ought to insure that all tobacco is not sold at

16

1 Albertson's and Safeway and Fred Meyer. Maybe it
2 should all be sold at OLCC stores and you can't walk in
3 there unless you are 21 years of age. That might be a
4 good thing, I don't know. But that's for society to
5 decide, for our elected representatives to decide.
6 It's not for us here in this courtroom to decide.

7 So let's talk about Michelle Schwarz's decision to
8 smoke.

9 I showed this to you on opening statement, a
10 little simple time line.

11 January 1964, the Surgeon General's Report was
12 issued and published in every newspaper in the country.
13 Nine months later, Michelle Schwarz went to nursing
14 school. She was a nonsmoker then. Sometime between
15 September and December, she started dating Dr. Schwarz,
16 who was a smoker. The warning came on the packs about
17 a year later.

18 Why do young people start smoking? You have
19 some -- quite a bit of evidence on that point. If you
20 believe Dr. Pollay, it's all advertising. But what did
21 Dr. Burns say, the physician from California who has
22 worked on the Surgeon General's Report, what did he
23 say? He said: Young people start smoking as a, quote,
24 symbolic act. He didn't say one word about advertising
25 causing young people to smoke.

17

1 Dr. Benowitz, the addiction specialist, what did
2 he say why people start to smoke? Quote: The most
3 important reason is social, friends.

4 That resonates with our life experiences.

5 Dr. Resnick, the fellow who was retained about two
6 weeks ago for the first time and testified in this
7 case, said the primary reason is their peers. That's
8 why young people start smoking. It's not the
9 advertising.

10 Mr. Wobbrock calls Dr. Pollay an impartial expert?
11 Excuse me. Excuse me. Dr. Pollay is a hired expert
12 witness. He's a professional witness. He flies around

13 the country testifying in tobacco trial after tobacco
14 trial, and he does it -- well, you decide why he does
15 it. Do you think Dr. Pollay is totally objective about
16 the issue of advertising? Do you think he's totally
17 impartial? Do you think he doesn't have any biases
18 here? You don't think he has an ax to grind, to use
19 Mr. Wobbrock's expression.

20 Looking at his testimony, ladies and gentlemen, I
21 would submit you could easily conclude Dr. Pollay came
22 in here and tried to pull the wool over your eyes a
23 little bit. Okay.

24 Dr. Pollay tried to mislead you about two points
25 that I would submit you ought to think about in

18

1 evaluating whether his testimony makes sense and
2 whether you want to accept it.

3 First of all, he showed you that grid that
4 Mr. Wobbrock had -- remember that grid with all those
5 colors on it -- and said: Look at this advertising.
6 And he tried to imply how Philip Morris controlled the
7 airways back in the '60s, and how Philip Morris would
8 be able to get everyone to smoke because they ran the
9 airways, right?

10 Okay, do you remember that? You can barely tell
11 what was red, what was pink, what was orange. And,
12 yes, I asked Mr. Walsh to do his technical maneuvers.

13 Again, please, Mr. Walsh, just take them all off
14 except the Philip Morris.

15 Why didn't Mr. Pollay -- excuse me, Dr. Pollay --
16 bring that in? I mean, at least it would have been
17 honest, ladies and gentlemen. At least he would have
18 been telling you the straight story: Yes, Philip
19 Morris advertised on television.

20 Well, there it is. They didn't monopolize the
21 airways.

22 And then another point: Dr. Pollay showed you 45
23 minutes worth of Benson & Hedge's, the "oh, the
24 disadvantages" ads. Do you remember those? What
25 didn't he tell you? He didn't tell you that those ads

19

1 didn't start running until at least 1966, two years
2 after Michelle Schwarz started smoking. Those TV ads
3 had nothing to do with her starting smoking. Why did
4 Dr. Pollay not tell you that? When those ads started
5 running on TV, Michelle Schwarz was 20 years old. She
6 wasn't a kid.

7 And I would submit Dr. Pollay's omission was not
8 inadvertent, but it was calculated. After all, the man
9 has, what, over 10,000 cigarette ads in his library.
10 He knows when these ads ran. But he didn't tell you
11 the truth.

12 And let's look at the quality of his opinions.
13 Did what he told you make sense to you? How many ads
14 did Dr. Pollay show you? Look at this, like at that.
15 Remember all those ads he showed you: Football players
16 and baseball players and swimmers.

17 How many Benson & Hedges ads did he show you; a
18 couple? Other than the TV ads. I'm talking about the
19 ads that Michelle Schwarz would have seen between,
20 let's say, 1960, when she was 14, to 1964, when she as
21 18 and chose to smoke. How many Benson & Hedges ads
22 did he show you?

23 Did Dr. Pollay, the advertising expert, show you

24 how those Benson & Hedges ads would appeal to a 14 to
25 18 year old girl; did he dissect those ads and say:

20

1 Look at this, look at that, see how that would appeal
2 to a young girl living in Illinois. No. Instead, he
3 spent about one minute or less showing you Benson &
4 Hedges ads. Glossed right over it.

5 Why did he gloss over them? Because he has
6 nothing to say about these ads. That's why. He
7 can't -- he couldn't think of one thing about these ads
8 that would possibly appeal to a 14 year old girl or an
9 18 year old young woman. He implied -- he stated
10 Philip Morris targeted youth.

11 Use your common sense, ladies and gentlemen.
12 Right here, right now, look at those ads. Is that
13 youth advertising? Is that the kind of ads that
14 appeals to kids, 14 year old girls?

15 You know, we saw one ad in this trial that might
16 appeal to kids, and it was this one: "Make the right
17 move. Think. Don't smoke." Ads that Philip Morris
18 run. I kind of grew up in the '60s, and that ad
19 would -- I could have related to that ad in the '60s.
20 I guess that look is now back.

21 And there it is.

22 If you were marketing to kids, if you were trying
23 to get kids to smoke cigarettes, would you have an ad
24 that would look something like that, with someone
25 holding a cigarette that a young person could relate

21

1 to? And those aren't Benson & Hedges ads, those aren't
2 Merit ads.

3 You can talk about youth targeting, youth
4 marketing, all you want. But the proof, as my Dad used
5 to say, is in the pudding. Look at the ads. Compare
6 those ads to the ads in this case.

7 Now, in cross-examination, Dr. Pollay backed off a
8 little bit. He said: Yeah, I guess there are other
9 factors involved in smoking besides ads. You do have
10 to look at the information environment. That's true.
11 What's that, Doctor? I had to pull it out of him line
12 by line. He wouldn't give an inch voluntarily. Well,
13 yeah, includes school, what you learn in school; yeah,
14 it includes mass media articles in the newspaper and
15 magazines about the dangers of smoking; yeah, it
16 includes what your parents tell you; it includes what
17 your spouse would tell you, especially if your spouse
18 was a doctor. That would be particularly credible. It
19 does include what your friends might tell you, it does
20 include what the government might tell you with
21 warnings. That's true, he said.

22 And he acknowledged that countries where there's
23 never been cigarette advertising until very recently,
24 like Russia, communist country for 60 years, no
25 advertising, high rates of smoking.

22

1 So do ads cause smoking? Is that the only reason
2 people smoke? Of course not. People don't smoke
3 because of ads, they smoke for other reasons.

4 And then I asked Dr. Pollay to explain this. If
5 advertising takes away our free will, if advertising
6 controls our desires, if we are slaves to advertising,
7 why is it, why is it that in the face of this
8 advertising behemoth that Dr. Pollay described to you,

9 why is it that in the face of that in this country,
10 smoking rates have dropped dramatically and
11 significantly? If advertising was so effective, that
12 wouldn't be the case.

13 This demonstrates, ladies and gentlemen, that
14 cigarette advertising and marketing does not control
15 people's decisions or people's choices. Advertising
16 and marketing does not erase people's awareness and
17 knowledge and understanding that cigarette smoking is
18 dangerous and can kill you because this represents the
19 millions and millions of Americans who have quit, and
20 the millions and millions of Americans over the last 20
21 years who have chosen not to smoke in spite of
22 advertising, in spite of marketing.

23 Mr. Wobbrock says: Oh, all those green charts,
24 you know, that's not evidence. Well, that is evidence.
25 That's fact.

23

1 Let's talk a little bit more about evidence, about
2 why Michelle Schwarz, how she related to ads.

3 Shirley Chuck-Dye testified that Michelle Schwarz
4 never told her that she felt misled by cigarette
5 advertising. Dr. Schwarz testified that cigarette ads
6 had no impact or affect on Michelle Schwarz.
7 Dr. Schwarz testified that Michelle Schwarz never told
8 him, ever, in 33 years of marriage, that she started
9 smoking because of advertising. That's evidence.
10 That's not rhetoric.

11 I would submit that your common sense, your life
12 experiences in this society, tell you that advertising
13 does not cause people to start smoking any more than
14 the multimedia advertising blitz of Anheuser-Busch
15 caused Michelle Schwarz to drink beer, because she
16 chose not to bring beer, and she was subjected to
17 millions of Budweiser and Coors and every other kind of
18 beer ad -- they're on television -- for 40 years. And
19 they had no affect on her because she didn't want to
20 drink beer.

21 Michelle Schwarz started smoking for the same
22 reasons a lot of people, including young people,
23 started smoking: Family, both the mother and father
24 smoked the whole time; peers.

25 We don't know much about Michelle Schwarz's

24

1 friends growing up, but we know about one, probably the
2 most important friend she ever had, Dr. Schwarz.
3 Michelle was an 18 year old young woman living away
4 from home for the first time, going to nursing school.
5 She met a third year medical student by the name of
6 Richard Schwarz, the next year he was Dr. Richard
7 Schwarz. He was six years older than she was. I don't
8 know, but I think you can make a fair interpretation of
9 the evidence that it's highly unlikely Michelle Schwarz
10 ever dated a man six years older than she is. She had
11 just graduated from high school. She was probably used
12 to dating high school boys, and all of a sudden she
13 runs into a sophisticated man, a highly educated man,
14 Richard Schwarz. And he was smoker. What does your
15 common sense tell you about the single most important
16 reason why Michelle Schwarz all of a sudden started
17 smoking within a couple of months after meeting
18 Dr. Schwarz and dating him.

19 What does your life experience tell you about what

20 was most likely, most important to Michelle Schwarz.
21 She wanted to look grown up, probably. She wanted to
22 demonstrate her independence from her mother and
23 father, who told her that she could not smoke while she
24 lived in the family home.

25 Compare that impact, ladies and gentlemen, compare
25

1 what's going on inside the head of an 18 year old young
2 woman dating a six year older medical student, compare
3 that to the wooden ducks and the microscope and the
4 golf balls of the Benson & Hedges ads that were in
5 magazines. What does your common sense tell you is
6 most important and resonating most powerfully with
7 Michelle Schwarz.

8 Let's talk about youth smoking. I have to address
9 this topic because, like I said, it's a hot button
10 topic.

11 If you believe Philip Morris affectively
12 advertised and marketed, targeted, planned to get 12
13 year olds to smoke cigarettes, you might not think
14 about any of the other evidence in this case because I
15 bet that would make you angry, as well it should. But
16 youth smoking, ladies and gentlemen, in this courtroom
17 doesn't have anything to do with Michelle Schwarz
18 because she was not a kid when she began smoking. Our
19 society's rules said it was okay for Philip Morris to
20 market cigarettes and sell cigarettes through its
21 distributors and retailers to 18 year olds. Philip
22 Morris was not breaking the law, nor was Michelle
23 Schwarz breaking the law back in 1964 when she
24 purchased her cigarettes.

25 But you saw some documents, old documents from
26

1 Philip Morris, six or seven or eight -- I didn't count
2 them all -- which do indicate at least someone at
3 Philip Morris, at some time, at some place, was taking
4 a look at statistics -- 90 percent of them dealt with
5 publicly available statistics -- but all the same, was
6 taking a look at statistics involving the smoking
7 patterns of 14 year olds and 15 year olds, and even
8 some 12 year olds.

9 I asked Nancy Lund to come out here to Portland,
10 Oregon, the most senior advertising and marketing
11 person at Philip Morris -- she is at the top -- to come
12 in here and look you in the eye and tell you about
13 that. And she told you straight up: That was
14 inappropriate. That's offensive. That's not the
15 Philip Morris I know.

16 Most of those documents are written by Meyer and
17 Johnston, a demographer down in Richmond, the Marketing
18 Department, the advertising departments in New York
19 City. He's not part of the Marketing Department and
20 never was. None of those documents talk about how to
21 craft advertisements that will appeal to 12 year olds.
22 None of those documents talk about developing marketing
23 strategies to increase the share of 14 year olds
24 smoking Marlboro. None of those documents, none of
25 those data, was used in the Marketing Department.

27
1 According to Nancy Lund: Those documents did not, do
2 not and never have represented Philip Morris policy.

3 I would submit there are three basis for you to
4 conclude that. First and foremost, like I said before,

5 look at the ads themselves. What Philip Morris ad --
6 and I'm not talking about some other competitor's ads,
7 I'm talking about Philip Morris ads. That's the
8 evidence you are bound by the Court's instructions to
9 consider in this case. What Philip Morris ad -- and
10 you're going to have dozens and dozens of them to look
11 at, and I invite you to look at every one of them.
12 What Philip Morris ad have you seen in this courtroom
13 that would appeal to youth, that's youth targeting,
14 that's youth marketing. You make that call. You don't
15 need a marketing degree, you don't need to be an expert
16 witness, you don't need to have a Ph.D. to make that
17 call. That call comes from you, your common sense,
18 your life experiences.

19 Second basis, the reason I think I know that, or I
20 would submit you should find that this was not Philip
21 Morris company or policies of Philip Morris, we've
22 heard again and again and again about the millions and
23 millions of pages of Philip Morris internal documents
24 that have been released. Most of them were released
25 starting in 1994; and as the years went on, more and

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1 more were released. If Philip Morris had a policy, a
2 practice of targeting and marketing to youth, you would
3 have a series of documents in this case that would go
4 to the ceiling. There would be hundreds and hundreds
5 of pages showing internal Philip Morris youth marketing
6 strategies, and there isn't. There's only a handful.

7 And the third reason is that you have the
8 testimony of Nancy Lund. Nancy Lund told you straight
9 up: I don't want my kid to smoke, I don't want your
10 kid to smoke, I don't want Mr. Wobbrock's kid to smoke.
11 And she looked you in the eye and she told you that.

12 Your job is to determine credibility of the
13 witnesses. You have to make the assessment whether
14 Nancy Lund came here from New York and lied to you.
15 Nancy Lund said: I have gone through thousands of
16 marketing and advertising documents going way back, and
17 I saw no evidence that any marketing or advertising
18 campaign targeting youth was ever carried out.

19 Where is the evidence inconsistent with that,
20 other than those handful of documents from the
21 demographer who wasn't even marketing for them.

22 This case is about knowledge or awareness, the
23 knowledge and awareness of Michelle Schwarz. I believe
24 the evidence has shown that Michelle Schwarz was warned
25 that smoking was dangerous and a hard habit to break,

29

1 addictive, dependant, whatever word you want to use;
2 according to Dr. Benowitz, they're synonymous. She
3 knew that. She knew that from her, as Dr. Pollay calls
4 it, her information environment. And I'm here to tell
5 you, her information environment did include cigarette
6 advertising. I can't deny that. I'm sure -- we don't
7 have any direct evidence of it -- but I think we can
8 safely assume she did see cigarette ads when she was
9 growing up and after she started smoking. And it's
10 going to be for you folks to decide whether or not
11 those advertisements would erase an intelligent
12 person's knowledge and understanding that cigarette
13 smoking is dangerous. That's your call to make.

14 And part of that information environment, as
15 Dr. Pollay said, you have to consider what he called

16 source credibility. Source credibility. Because not
17 all sources of information are equal. Some are more
18 believable than others.

19 Where did Michelle Schwarz get her information
20 about smoking?

21 One source was her mother, Shirley Chuck-Dye, a
22 smoker herself, yes. And Shirley Chuck-Dye came in
23 this courtroom and told you the truth. As Mr. Wobbrock
24 correctly point out, she told you that she loved her
25 daughter very much. She told you about the pain that

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1 she's experienced because of the death of her daughter.
2 And she told you that's not the way it's supposed to
3 be. And she's right. Because a loving mother, she
4 also gave Michelle Schwarz the information that she
5 needed to make some of the difficult decisions in life
6 that we all have to make. And one of them was smoking.
7 Remember, she said: Gee, I read that 1952 Reader's
8 Digest article -- because we subscribed to that
9 magazine the whole time Michelle was growing up --
10 Reader's Digest article from 1952 called Cancer by the
11 Carton. And, boy, that got my attention. That said
12 right there flat out: Smoking is a cause of lung
13 cancer. Smoking increases your risk of dying.

14 So what did Shirley Chuck-Dye do? What any mother
15 would do. Sat Michelle down and said: Hey, don't
16 smoke. Here is why. But it wasn't just one time. It
17 wasn't just one article in 1952 when Michelle was an
18 eight years old. Of course not.

19 The evidence was Reader's Digest was on a campaign
20 against smoking. They had a long series of articles
21 from 1952 all the way through the '60s about the
22 dangers of smoking. And Shirley Chuck-Dye testified
23 that she pointed out to Michelle Schwarz those articles
24 as they appeared. Talked to her about it. Not just
25 once. Talked to her more than once about the health

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1 risks of smoking. In fact, her mother told Michelle
2 that smoking was a nasty habit and about the worse darn
3 thing you could do.

4 Now, that's good, common sense information that
5 Michelle Schwarz had. I think all of us believe our
6 mother. We don't always follow our mother's advice.
7 Sometimes we think we know better, and we make
8 decisions independent of what our mother told us or our
9 father told us. But whose responsibility is that?

10 When our 18 year olds do what we don't want tell
11 them to, and you give them the keys to the car and you
12 say: Look it, I don't want any drinking; and if you do
13 drink, do not drive home. Call a cab or get me to come
14 and I'll come pick you up. Sometimes our kids don't
15 listen to us. Whose responsibility is it?

16 An 18 year old goes out and buys a six pack of
17 Colt 45 malt liquor and gets drunk and injures someone,
18 whose responsibility is that. Or injures themselves?
19 Whose responsibility is that?

20 We don't know much about what Michelle Schwarz's
21 father told her. We do know that he switched around
22 1970 from smoking regular cigarettes to Carlton, an
23 ultra low cigarette. And we'll talk a little bit more
24 about that later. Circumstantial evidence might tell
25 you he probably talked to Michelle about why he was

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1 switching to that cigarette. But we do know he told
2 her at some point in time that smoking is dangerous and
3 asked her to quit.

4 And then we know that she had a teacher, kind of a
5 quirky fellow, but her teacher. High school biology,
6 1962, 1963, Lincoln Way High School. And he came in
7 here and told you: Michelle Schwarz was in my biology
8 class. I don't remember much about her, except I fined
9 her 25 cents for losing her locker key because I had
10 that written down someplace. But she was in my class.

11 And we spent a week, when we got to the
12 respiratory system, we spent a week talking about how
13 the lungs work, and we spent a couple days talking
14 about the risks of smoking. And we talked about how
15 smoking -- what it does to the lungs and the bronchi.
16 And we talked about the particulate matter in smoke and
17 how smoking can kill you, how smoke can cause lung
18 cancer.

19 And I showed my students photographs of lung
20 cancer in the lung. And I had my students look at
21 slides with lung -- with lung tissue, with cancer in
22 it. And they looked at the slides through the
23 microscope and they drew the abnormal cancerous cells
24 as part of their homework. And I handed out American
25 Cancer Society pamphlets.

33

1 That was part of Michelle Schwarz's information
2 environment, it was part of the information environment
3 of all of her friends that went to that same high
4 school.

5 Maybe Michelle Schwarz chose to disregard the
6 information that her teacher had provided for her.
7 Whose responsibility was that? Does that mean
8 Mr. Garrelts is a failure, as Mr. Tauman would have it?
9 A failure? He did his best. Maybe he could have done
10 better. I don't know. But at least he gave his
11 students the basic information.

12 Defense Exhibit 652, the biology textbook used in
13 her classroom, the textbook that Mr. Garrelts used to
14 lecture his students about. "Recent research indicates
15 a possible link between smoking and lung cancer. The
16 Public Health Service has stated the evidence indicates
17 that excessive smoking is one of the causative factors
18 in lung cancer. Some of the tars formed by the burning
19 tobacco have been found to be carcinogenic agents; that
20 is, capable of producing cancer."

21 "A smoker actually becomes a slave to two habits,
22 the smoking habit and the tobacco habit. The heavy
23 consumers of tobacco also acquire a physiological
24 craving for tobacco, the tobacco habit."

25 That's the word they called it in the '60s,

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1 "habit."

2 That information was provided to Michelle Schwarz.
3 Maybe she chose not to believe it, maybe she chose to
4 disregard it. But whose responsibility is that?

5 Next item on the list is the press. I'm not going
6 to -- I'm sure to your relief -- go through the
7 hundreds and hundreds of articles that you'll have in
8 evidence, newspaper and magazine articles from the
9 magazines in the cities where she lived, Chicago in the
10 Joliet area in the '60s, St. Louis area where she went
11 to nursing school from the mid '60s to the mid '70s,

12 and the Oregon Statesman Journal. Article after
13 article after article after article talking about
14 smoking causes cancer, heart disease and other
15 diseases. Article after article talking about the
16 habit-forming characteristics of the addictive nature
17 of tobacco and how difficult it is to quit.

18 The Public Health Community. You heard a little
19 bit about the Surgeon General's Report. You heard a
20 lot about the Surgeon General's Report. It came out --
21 the first one, the most important one, initially came
22 out in 1964. It concludes that smoking was a principle
23 cause of lung cancer. "Smoking leads to a tobacco
24 habit and dependence. Nicotine is a drug or has
25 pharmacological actions, a habit, withdrawal symptoms."

35

1 You heard testimony, evidence about how it was a big
2 story. And you'll see that in the newspaper articles
3 that you'll have back in the jury room about how big of
4 a story it was.

5 That cigarette smoking is habit forming or
6 dependant causing or addictive isn't new. Dr. Benowitz
7 said it's been known for 75 years or more that tobacco
8 was addictive. Dr. Schwarz was a second year medical
9 student when that report came out. Would it be
10 reasonable to assume that a medical student might be
11 very interested in one of the biggest public health
12 stories to come around? Don't you think that that
13 report might have had something to do with his decision
14 just a couple years later to quit smoking?

15 Nursing school. We know that Michelle was going
16 to nursing school and studying human health.
17 Dr. Schwarz. She dated a medical student for about a
18 year, when she was 18. When she was 19, 1965, she
19 married the then Dr. Schwarz. Michelle Schwarz had
20 access to a lot more information than even most folks
21 have about the health risks of smoking. Dr. Schwarz
22 quit smoking in 1968 because he knew smoking could
23 cause disease.

24 Michelle Schwarz was married to a doctor. She had
25 access to all the information and all the privileges

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1 that come with that, and we're going to talk more about
2 that later.

3 Warning labels. The warning labels started in
4 1966. You've seen it before. Could it have been
5 stronger? Yeah. Could it have been better? Yeah.
6 But that's what Congress wrote in 1965. Does it give
7 you all the information? No. But doesn't it give you
8 the heart of the matter. Doesn't it tell you that
9 you're running a risk smoking these things? It doesn't
10 go into all the gory details, that's true. But a
11 living, thinking, intelligent person with a product
12 with that label on it would know: This is bad for my
13 health. I'm taking a risk.

14 That's what that warning label says. That was
15 part of Michelle Schwarz's information environment when
16 she chose to run the risk.

17 THE COURT: Mr. Dumas, we won't go to another
18 issue. If you want to finish with this issue, we will
19 stop for lunch.

20 MR. DUMAS: That will be fine, Your Honor. If you
21 just give me two more minutes, I'll wrap up.

22 THE COURT: All right.

23 MR. PHILLIPS: Thank you.
24 Michelle Schwarz chose to run the risk with just
25 this information. Forget the other labels, forget the
37
1 other information, just that. If she chose to run that
2 risk and ignore it, whose responsibility is that?
3 I don't know exactly how much Michelle Schwarz
4 smoked. The medical records go from half a pack to a
5 full pack, okay. That means ten to 20 cigarettes a
6 day. Ten to 20 times she picks up a pack with that
7 warning on it. Seventy to 140 times a week she has an
8 opportunity to read that warning.
9 And think about this warning in the context of the
10 way it developed. Here in 2002, that didn't mean much.
11 Back in 1965, it was such a big deal that the
12 government was putting a warning label on a product.
13 That was unheard of. Do you remember that one St.
14 Louis -- I mean -- yeah, it was St. Louis Dispatch News
15 article I showed you. They had a photograph of a side
16 of a cigarette pack in 1965 or 1966 saying: Look at
17 this. This is going to start January 1.
18 It was news, the fact that the government was
19 putting warning labels on cigarettes. Because back in
20 the '60s, you know, people didn't wear helmets when
21 they went skateboarding -- they probably didn't have
22 skateboarding -- they didn't have helmets when they
23 went bicycle riding, they didn't wear seatbelts in the
24 early '60s, there weren't nutrition labels on food.
25 This was unique, it stood out and it was news. And it
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1 was written by the US government, and it became the
2 law.
3 One last comment on warning labels, and then we'll
4 break for lunch.
5 Not everyone in 1965 felt that warning labels on
6 cigarettes were necessary. The American Medical
7 Association, an organization Dr. Schwarz probably
8 joined, stated in 1964: With respect to cigarettes,
9 cautionary labeling cannot be anticipated to serve the
10 public interest with any particular degree of success.
11 The health hazards of excessive smoking have been well
12 publicized for more than ten years and are common
13 knowledge. Labeling will not alert even the young
14 cigarette smoker to any risks of which he is not
15 already aware.
16 That was true for Michelle Schwarz in 1964, 1965
17 and 1966, as it was for millions of other Americans.
18 Thank you, Your Honor.
19 THE COURT: All right.
20 Members of the jury, we'll stop for lunch now.
21 But I need you back in the jury room about
22 12:58 because we are going to start again at
23 one o'clock.
24 Have a nice lunch.
25 (Jury leaves the courtroom at 12:01 p.m.)
39
1 THE COURT: The Court is out of session.
2 The Court needs counsel back in the courtroom at
3 1:00 p.m.
4 MR. PHILLIPS: Thank you, Your Honor.
5 THE COURT: Let's make that 12:59, for you.
6 (Court was in recess)
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(Estelle Keating reports the next session)

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STATE OF OREGON

ss.

County of Multnomah

I, Charlotte A. Powers, Official
Court Reporter of the Circuit Court of the State of
Oregon, Fourth Judicial District, certify that I
reported in stenotype the foregoing proceedings in the
above-entitled case.

I further certify that my
stenotype notes were reduced to transcript form by
Computer-Aided Transcription under my direction.

And I further certify that pages 2
through 40 contain a full, true, and accurate record
of my stenotype notes.

Dated this 28th day of August,
2002, at Portland, Oregon.

Charlotte A. Powers, RPR, CSR

Official Court Reporter

I certify this original/duplicate is valid only if it bears
my true signature and blue colored CSR seal.

Charlotte Powers